

No. 3946

United States Circuit Court of Appeals for the Ninth Circuit,

PAUL HARBAUGH,

Appellant,

vs.

JOSEPH F. DWYER,

Appellee.

APPELLEE'S BRIEF

Upon Appeal from the United States District Court
for the District of Oregon

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Statement of the Case.

On the 22nd day of March, 1919, John F. Dwyer, the appellee, brought his bill of complaint against Paul Harbaugh, the appellant, et al., in the United States District Court for the District of Oregon, alleging infringement of Letters Patent No. 1,268,222, dated June 4th, 1918, issued to appellee for "Ticket Dispensing Machines." By his bill he sought a permanent injunction, as well as

injunction *pendente lite* against the alleged infringement. On the 27th day of March following, the matter came on for hearing before Honorable Judge Wolverton, upon appellee's motion for temporary injunction. The appellee appeared in person and by his solicitors. The appellant Harbaugh appeared in person and by his solicitors and resisted the motion, and a full and exhaustive hearing was had.

The alleged infringing device, as well as the patented device of appellee, was introduced in evidence. Affidavits and other evidentiary matters, pro and con, including the patent in issue, were considered by the court. Thereupon Judge Wolverton, after arguments of counsel, found that appellant's device was an infringement of the claims of appellee's letters patent, and granted a temporary injunction restraining appellant from further making, using or selling the infringing device. As a condition to granting the injunction the court required appellee to give a bond in the sum of \$10,000, or deposit Liberty Bonds of like amount "*to secure the payment of any damage which may be awarded to defendants, if upon final adjudication it shall appear that defendants do not infringe the patent in suit.*" (T. R. 11.) Appellee deposited Liberty Bonds in the amount fixed and the injunction *pendente lite* issued.

The defendants answered, setting up several

defenses and further pleaded, in substance, that appellant Harbaugh was the only party defendant in interest. By supplemental answer, he pleaded issuance to him of letters patent, number 1,339,823, of date May 11, 1920, for "Ticket Dispensing Device." Thereafter the cause came on for trial upon bill and answer and evidence introduced by the parties. The court on the 20th day of December, 1920, filed an opinion in the cause holding that appellee's patent was narrow, and not entitled to a broad range of mechanical equivalents, and as so construed was not infringed by Harbaugh's device; and further held the device to border upon a gambling instrument, and that equity would not interfere on the ground of public policy (T. R. 27).

Following the opinion, a decree was entered dismissing the bill of complaint, vacating the injunctive order and referring the cause to the standing Master of the Court to ascertain the damages, if any, suffered by the defendants by reason of the injunction (T. R. 27-40). The matter was heard by the Master upon the order of reference, and on the 5th day of June, 1922, he filed his report, assessing damages against appellee in the sum of \$13,650 (T. R. 41-52). Appellee filed exceptions to the Master's report, which in due time came on to be heard by the court. The hearing was followed by an opinion and the entry of decree based thereon setting aside the Master's report, refusing appellant any recovery for loss arising out of the injunctive

order, and exonerating the injunction bond (T. R. 52-59).

From this decree appellant prosecutes his appeal. In our further statement of the case, we will, therefore, confine ourselves to those facts which are material to the issues presented by the report of the Master, and the exceptions thereto, and the decree rendered upon the exceptions to the report. It will not be out of place at this point to refer to some facts that would not be material, except for certain statements made by appellant, and arguments based thereon, in his brief relating to the good faith of appellee in prosecuting this suit.

In the first place, Dwyer had successfully applied for a United States patent, clearly and specifically describing his device. As is self evident in a patent case, the patent in issue is the first thing to be considered by the court. The court, therefore, had full knowledge of this patent. In the application for preliminary injunction affidavits were presented by both sides, including the affidavits of patent experts, so that Judge Wolverton had the advantage of a clear description and exposition of the patent from the viewpoint of both sides. Furthermore, Dwyer was concededly the first to make use of a device of this character. One infringer by the name of Enloe had begun business in Portland and had purchased merchandise for the purpose of the infringement, from Harbaugh, the appellant in this case (T. R. 72, 73).

When Enloe was enjoined, Harbaugh, the appellant admittedly set out to imitate plaintiff's device.

He made minor mechanical changes with the hope of avoiding, by a technical difference, the charge of infringement, while appropriating the idea. The two devices look alike and operate substantially alike and are used for the same purpose. Harbaugh merely substituted a pack of tickets for a roll of tickets and provided a removable top instead of a removable back, which changes were and are, in our opinion, merely mechanical equivalents. That Harbaugh was an imitator was conceded by himself.

“Question. And you got this idea, Mr. Harbaugh, for using your device, whether it is the same as his or not, from the one—from having seen Mr. Enloe and the plaintiff in this case selling merchandise by means of this device, isn't that right?

Answer. Probably.

Question. Now, that is a fact, isn't it? That you had never seen it before until you saw either the plaintiff or Enloe's, isn't that a fact?

Answer. Yes.

Question. Now, Mr. Harbaugh, you had sold for Mr. Holsman a considerable quantity of merchandise through Mr. Enloe, by means of his Silent Salesman, hadn't you?

Answer. Yes.

Question. And when he was enjoined by the court, it cut off a considerable source of revenue for you, didn't it?

Answer. Yes.

Question. Then you took this device and started to see if you and Holsman couldn't work out something of it for yourself. Isn't that right?

Answer. Something of that nature, yes.

Question. Now, as far as new business was concerned, after this preliminary injunction was issued, instead of putting out this same box, this same kind of box which was introduced in evidence as plaintiff's Exhibit 2, you built another kind of box, didn't you, with which you supplied all the business you have been able to get?

Answer. Yes.

Question. And as you said yesterday, you had never seen this device used or any selling of merchandise by a device of this kind until you saw the Dwyer and this Enloe device?

Answer. That is correct.

Question. And that is where you got your idea?

Answer. Yes, sir."

Harbaugh knew he was infringing the substance of Dwyer's idea and was afraid of the consequences (T. R. 121).

While it is not probable that the Circuit Court of Appeals will now care to concern itself with the details of this device, yet in order to show the good faith of Mr. Dwyer in bringing this suit, and of his reliance upon reputable patent authority, we ask the court to read the testimony of Mr. H. L. Reynolds as set out in T. R. 75, wherein he clearly summarizes the similarity between the two machines. He points out "that the results secured in the one case are the same as in the other and the means for securing it are also the same." He further points out that the only difference consists of mere mechanical details and holds that the substitution of a ticket pack for a ticket roll and removable top for a removable back are mere mechanical equivalents. The fact that Judge Wolverton, after a full hearing, held the patent infringed, shows that Dwyer had at least reasonable grounds for endeavoring to show the validity and infringement of the patent. Judge Bean, while holding the patent not infringed, considered the case for several weeks before arriving at a decision.

Appellee Dwyer took an appeal from Judge Bean's decision to the Circuit Court of Appeals, but immediately ceased business and abandoned said appeal when the Supreme Court of the State of Washington, in a suit which Mr. Dwyer instituted,

held that the prevalent use of the device was illegal. We submit from the above that Mr. Dwyer was acting in good faith in seeking relief from the courts, and that the patents and the opinion of patent counsel fortified him in his right to secure an adjudication upon the question of infringement.

Furthermore, Dwyer brought his infringement suit believing that the use of the device as disclosed in the patent, and as imitated by Harbaugh, was not in violation of the gambling laws. He had obtained a decision of the Superior Court of King County, Washington, adjudging the Silent Salesman a lawful device (T. R. 180), and in other courts of inferior jurisdiction there were similar holdings. Justified by the patent itself and by the decisions of these courts, he had a right to his belief, erroneous though it may have been proven to be. On the other hand, Harbaugh sought to use the plea of illegality of the device as a defense in the infringement suit. He, himself, testified (T. R. 91) that there was a lottery connected with the business and that the device was "actually a substitute for the punch board." So that Harbaugh, in securing the dismissal of the injunction suit, received the benefit of his own showing of illegality. It is obvious that a ticket dispensing machine such as this might be used for perfectly legitimate purposes. It is the use which Harbaugh admitted he made of it which was illegal and gambling. There is no claim at any place in the record that Harbaugh ever used

this device or attempted or intended to use it for any purpose other than selling merchandise on the lottery basis.

The first, second and thirteenth exceptions present the question whether the loss of anticipated profits that might have arisen from the operation of a gambling game can form the basis of recovery in a court of equity. It becomes necessary therefore to inquire whether the defendant's use of the device in controversy was illegal. As to this there is no controversy. In the Master's report it is said:

"Both the plaintiff and the defendant admit that the device used by them in their respective business was in effect a gambling device."

The Supreme Court of Washington some months after the decision in the infringement suit, in the case of *Dwyer vs. City of Seattle*, 199 Pac. 740, held the device to be prohibited by statute.

Judge Bean in his opinion sustaining the exceptions to the Master's report, after describing the operations of the machines, says:

"It is therefore clearly, and is now conceded to be a gambling device."

The operation of the gambling device is prohibited by the statutes both of Oregon and Washington.

Harbaugh himself testified on the trial that his only use for the machine was to sell merchandise by giving the purchaser an element of gain by chance, so that as the records stand, he used his device in no other way, and intended to use it in no other way than for gambling purposes, and in that use lay all his profits (T. R. 90-91).

The third and fourth exceptions to the Master's report go to the question as to whether the appellant Harbaugh is the real and sole party in interest. (See T. R. pp. 165-166 as to Harbaugh's pooling agreement respecting any prospective damages he might secure.)

The fifth and sixth exceptions present the question as to whether appellant was chargeable with such violations of the injunction as will preclude him from recovery on the bond.

The seventh, eighth, ninth and tenth exceptions raised the question as to the sufficiency of the evidence to afford any reasonable basis for the computation of alleged loss of profits and gains by appellee. On this question we think it fairly appears from the evidence that Harbaugh's books of account were so mutilated as to be worthless (T. R. 122-135); that the entries made therein were sometimes made by his bookkeeper and sometimes by himself, but were not made in orderly sequence of time and that several of the entries upon which he based his claim of loss of profits were made long after the

actual date of the transaction, and after the issuance of the temporary injunction (T. R. 122-133); and for most of the time he kept no checking account (T. R. 121); that for the period when he kept a checking account his check stubs are lost (T. R. 121); that his cash book and express book were lost, and could not be produced (T. R. 124); that he had no records, vouchers or invoices as to goods bought (T. R. 120); that he had no original record of any moneys received or expended (T. R. 126); that his correspondence was lost (T. R. 137); that he was unable to fix any profits from merchandise disposed of by his machines (T. R. 147); that it was impossible to form any opinion or judgment as to the amount of business that he might have done after the injunction, Harbaugh, himself, testifying (T. R. 130-131):

“It would be impossible to state definitely what amount of business I would be able to do the following month, assuming I could use this box (Plaintiff’s Exhibit 2) because of certain business conditions that existed generally throughout the country. It might depend on the business ability of the people with whom these boxes were placed; on the retail trade they got during that period; on the state of business conditions, whether it was a healthy condition or sluggish where the boxes were placed; on the spending ability of the people who patronized the merchants with whom the boxes were placed. Also on the acquiescence of the police authorities in their disposition to al-

low the stuff to be sold in the manner in which it was sold, whether the returns would be little or much. There have been a number of cases where I have been compelled to discontinue the use of these boxes in certain localities because of police interference. This has been true in certain localities in both Oregon and Washington and might be true any place. In other words, this device has been construed by a number of police authorities as a gambling device.”

Furthermore, there is no word of evidence in the whole record that appellee ever did business with a single, actual or prospective customer of appellant. It was not for appellee to prove that he did not make a profit out of appellant’s customers. It was for appellant to prove that he did. By no process of reasoning can his suppositions, speculative loss of anticipated profits be made a measure of our gain, and unless we gained he has no possible basis for recovery even under the Master’s theory.

The eleventh exception presents the question as to whether recovery can, in any event, exceed the amount of the bond.

Brief and Argument.

In presenting the law of the case, we state our propositions in the following order:

First: The anticipated profits sought to be recovered, being profits that would have arisen from

a criminal act, viz: the operation of a gambling game, equity will not aid appellant, because contrary to public policy and against good morals. Or, stated in another way, the anticipated profits that might arise from the commission of a crime are not recoverable from one who interferes with; interrupts or prevents the crime.

Second: There having been a substantial violation of the injunctive order by appellant, he will not be heard in a proceeding to recover on the injunctive bond.

Third: The evidence of loss of anticipated profits is so speculative, uncertain and remote that it affords no basis for a reasonable computation.

Fourth: The amount of the injunctive bond fixes the extreme limit of appellant's recovery.

I.

As we have seen, appellant's machine is admittedly, and beyond peradventure of a doubt, a gambling device, used exclusively for gambling. Stripped of all verbiage and baldly stated, appellant's proposition is this:

"I was engaged in the commission of a crime and making money out of my criminal acts. By injunction you interrupted my criminal course. Thereby you deprived me of the fruits of the crime to the amount of \$13,650.00. You were engaged in

the commission of a similar crime. By your act you eliminated competition between us, and took the profit I might have made out of my criminal operations. Therefore, you must pay me what I would have received as the result of my criminal activities, if you had not interrupted me.”

Let us state a parallel case in more simple terms. Says appellant: “I was burglarizing a house. It was filled with loot. You were engaged in a like enterprise. You got the drop on me, made me get out and took all the loot yourself. Pay me, therefore, the value of what I would have taken if you had not interfered and taken it yourself.” Now, the comparative enormity of the illustrative crime, and the crime in the pending case, is in no wise material, for the underlying principle must be the same.

Judge Bean said:

“He was prevented by the injunction, in effect, from violating the law of the country, and he claims now that he is damaged in a very large sum of money by reason of that fact.” (T. R. 57.)

Appellant’s machine is a gambling device and within the condemnation of the law. The operation thereof being not only contrary to public policy, but in direct contravention of penal statutes, no enforceable cause of action could arise out of its operation in favor of the operator. This principle

of law is too well established and too frequently recognized to require the citation of any authority. It is true, however, that enforceable liability sometimes arises out of a transaction that is wholly collateral to the unlawful business when it rests upon an independent consideration, unconnected with the illegal enterprise. It is contended by the appellant that the liability he seeks to impose upon the appellee falls within the last description. So we propound the question: "Does the liability of the plaintiff to the defendant, if any, arise out of a matter collateral to the unlawful business and does it rest upon an independent consideration unconnected with the outlawed enterprise?"

Or, to state it in another way: "Is it necessary to prove the illegal business—the operation of a gambling game, device or machine—and the illicit profits arising therefrom, in order to fix the amount of defendant's alleged liability?"

It seems too clear for argument that a negative answer must be given to the first question, and an affirmative one to the second. The order requiring the deposit of \$10,000 in lieu of an injunction bond is as follows:

"To secure the payment of any damages which may be awarded to defendants," etc.

II.

Appellant's solicitor, in his brief in the lower court, says:

“The direct cause of the loss of business which Harbaugh sustained was being forbidden to use his vending machines.”

III.

High, in his work on Injunctions, Sec. 1663, says:

“Liability upon an injunction bond is limited to such damages as arise from the suspension or invasion of vested legal rights by the injunction.”

The defendant says his damage is measured by the loss sustained by being forbidden to use his gambling machine. The law says he is limited to the damage that arises from the suspension or invasion of his vested, legal rights by the injunction.

Now, we must first inquire what vested, legal right the defendant had that was suspended or invaded by the injunction. His counsel answers that it was the right to the use of his gambling machine. The question then is: Can a man have a vested, legal right to the use and operation of a gambling game, or in the conduct and operation of a business which the law denounces as a crime? The question seems to answer itself. Let us examine it further by way of illustration:

John Doe and Richard Roe each operate a gambling house in adjoining premises. John Doe is making a net profit of \$1500 a month from his

house. Richard Roe enters Doe's house *vi et armis* and puts him out, closes up the house, and by means of force and threats prevents operation for nine months. Doe sues Roe, measuring his damage by the profits he would have made by the operation of his games, and alleging that Roe received the profits Doe would have made out of his unlawful enterprise. Is Roe a trustee *ex malaficio* who can be called into a court of equity to account? The proposal shocks common sense and common decency.

The terms of the order requiring the deposit of \$10,000 as a condition precedent to the issuance of the injunctive order are:

“To secure the payment of any damages which may be awarded to defendants, if upon final judgment it shall appear that defendant did not infringe the patents in suit.”

Now, what damages has he complained of? Why, the loss of profits that would have accrued to him through the operation of an unlawful business, viz: the running of a gambling game. What difference can it make in principle whether the law mistakenly stops a man by injunction from reaping profits from an unlawful business—bootlegging, brothel keeping, robbery, burglary, smuggling, or running a gambling game; or, whether he is stopped *vi et armis* by his competitor, as illustrated by the above hypothetical case of Doe and Roe? It must be admitted that in neither case would his action

or suit be entertained, because of the unlawful source of his supposed profits. In the case at bar the source for the measure of damages is the profits of a gambling game, in which appellant of course had no vested legal right.

Appellant predicates his right to recover upon this syllogism:

“I was engaged in a criminal business and making large profits therefrom. You interrupted my unlawful operations whereby I lost my illegal gains. Therefore, you must pay me the earnings I would have taken from the victims of my gambling games but for your interference.”

In other words, he says he has been damaged because he was prevented from committing a crime. His own counsel says it in so many words:

“The direct cause of the loss of business which Harbaugh sustained was being forbidden to use his vending machine.”

His whole argument is based upon that proposition. Of course, it is apparent that the statement destroys the defendant's case, and conclusively precludes his recovery upon the bond.

Mr. Justice Swain, speaking for the court, in *Coppell vs. Hall*, 7 Wall 542-558, says:

“Whenever the illegality appears, whether the evidence comes from one side or the other,

the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the condemnation reaches, it destroys. *The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation.*”

Until we read appellant’s brief we had never heard that an error in law, or mistake in weighing evidence, made by a court or judge, *ipso facto* made the litigant, in whose favor the error or mistake happened to be made, a tortfeasor. This is to us a new doctrine. Neither had we heard that a party who sought the courts to protect, or enforce, what he believed to be his rights, did so at peril of being chargeable with actionable wrong, if, perchance, he erred in his understanding of the law, or in his estimate of the weight and legal effect of his evidence. This is also a new doctrine, and we are indebted to appellant’s solicitor for the exposition thereof in his brief.

Appellant has a store of adjectives from which to draw at his will, as he variously terms the injunctive order issued in this case in the usual course of judicial procedure, after full hearing:

“Wrongful, illicit, tortuous, unlawful, illegal, unfair, etc.”

After having aroused his indignation to a

proper degree of heat he reaches a culmination by charging appellee with "unfair competition," and devotes several pages of his brief (39 *et sequi*) to an attempt to apply the equitable doctrine of "unfair competition" to the case at bar. We will answer his argument on this phase of the case with one question. When, or where, has the equitable doctrine of "*unfair competition*" ever before been invoked or applied to competing bootleggers, brothel keepers, bunco steerers, hold-up men, or gamblers? Again, appellant seems to be continuously in error in building the major part of his argument upon the theory that the suing out of the injunction was a tort. This conclusion he reaches by charging appellee with bad faith in the inception of the case, with deceiving and misleading the court, and by calling the appellee bad names.

Now, let us look for a moment at the facts of this case without reference to the solicitor's choice vocabulary of adjectives. In this connection we refer to our statement of the case, page—. Appellee has letters patent issued in due course by the government, *prima facie* establishing the fact that he has invented a novel and useful device. Counsel and those skilled in patent law, advise him that he has a valid patent. *Anisi prius* court of general jurisdiction declares it a lawful device and enjoins police interference with its operation. He believes his patent is being infringed. Counsel and patent attorneys advise him he is correct in his belief. He

goes into the only court competent to give him relief, seeking an injunction to protect what he believes are his rights. He brings before the court his patent and the device constructed under its specifications. He brings also the infringing device, and with it the infringer in person, and his counsel. The court hears evidence, examines the device, declares infringement and grants a temporary injunction. The only fact upon which appellant's charge of bad faith can rest is that we were silent when we should have spoken. But at that time the courts had held the device legal. But appellant was also silent. If appellee is guilty of bad faith, then perforce appellant is guilty of bad faith, and for the same reason. It follows, of course, that appellant and appellee in the light of appellant's argument are in *pari de licto*, and the court will, therefore, leave them where it found them.

Furthermore, if there was any matter of defense, showing an infringement or invalidity, defendant had full opportunity at the hearing on the application for temporary injunction, to present it.

Furthermore, although the case did not come on for trial for twenty months, defendant never moved to dissolve the injunction, and in fact delayed the trial of the case.

Appellant's first proposition (p. 38 of his brief) is:

“To correct that which the court has

wrongfully done by its process is one of the powers inherent in every court of justice. It is more than a mere power. It is a duty founded on the principles of justice."

So say we all. But, before attempting the practical application of a legal principle to the case in judgment, it is imperative to know what the facts are. Says the solicitor:

"To correct that which the court has wrongfully done by its process."

Now, there can be no wrong arising out of a process unless there is someone who has a legal, vested, enforceable right that has been injuriously affected or destroyed thereby. Now, what legal, vested or enforceable right has any man to anticipated profits that might have accrued to him from the execution of an unlawful enterprise that is made criminal by statute, condemned by morality and in contravention of public policy? If one commits a trespass in any sort of unlawful resort, made so by condemnation of law, and morals, and the consensus of society, he may be made to respond to damages to the extent of the physical injury inflicted, but the damages could not be enhanced by proof that the injury done necessitated repairs that closed the house for a day or a week, and so precluded the receipt of profits that might have arisen out of the criminal activities of the owner.

If one assaults a gambler, or any other sort of

criminal, he cannot plead the unlawful occupation or the general bad character of his victim, as a defense, but must answer in damages for the injury done. But, if the unfortunate complainant be put to bed for a week by reason of his injuries, can he by way of measure of damages show that he is a gambler and that but for the assault he would have taken from the pockets of the victims of his gambling enterprise \$1,000? Now, these illustrative suggestions are not strained, but fair parallels with the fundamental principles controlling the case at bar.

Appellant says:

“The plaintiff cannot be heard to say that both he and the defendant were engaged in an unlawful business. The transaction is closed.”

He then quotes from *Armstrong vs. Toler*, 24 U. S. (11 Wheaton) 258, as follows:

“If the promise be entirely disconnected with an illegal act and is founded on a new consideration, it is not affected by the act.”

We have no quarrel with this statement of the law. But the facts to which it was applied by Marshall, C. J., have no similarity to those in the case now in judgment. In that case B. imported goods from an enemy country contrary to an embargo act. B. declared the goods for duty. A. became surety to the government for the payment of the imposts. A. had to pay and sued B. to recover.

It was held that the payment by A. was in the nature of an advance or loan to B. for his use for a lawful purpose, viz: the payment of duties due the government, and was unconnected with B.'s unlawful act. A., therefore, recovered. We may be in accord with that judgment, but of what value is the case to us here? If A. had alleged that B. interfered in his smuggling operations and by such interference had deprived A. of illegal profits from the unlawful venture, which B. had realized through a monopoly of trade in contraband, then we would have a substantially parallel case.

Appellant was enjoined from doing an illegal act. That is, by the writ he was prohibited from operating a gambling game. Surely one cannot be allowed to claim damages by reason of being prohibited from committing a crime. In 17 C. J. 797, it is said:

“Loss of profits may not be considered as an element of damages where the business from which they would have resulted was, or would have been, conducted in violation of law. *The profits of an unlawful business cannot be any proper basis for the estimate of damages. This would seem to be too clear for argument.* The profits made on Sundays resulting from a violation of the Sunday law cannot have any legal basis for an estimate of damages. As well might it be claimed that the profits resulting from the operation of a gambling house, or a house of ill fame, could be used as a basis for damages.”

Perhaps we should inquire as to what is meant by "A cause of action or liability arising out of a matter collateral to an illegal contract, or unlawful business, and resting upon a new and independent consideration."

The case of *Brooks vs. Martin*, 69 U. S. (2 Wall.) 70, which forms the basis of the Master's opinion, is relied upon to bring this case within the stated exception. But we are sure that case was not rightly decided, and is contrary to accepted principles. But even if good law upon the facts, it is not of value here because the facts are fundamentally different. At all events, while it has not been in express terms overruled it has been so severely criticized and *limited* by the Supreme Court that its authority as a precedent, or as the basis of argument is entirely destroyed. In *McMullen vs. Hoffman*, 174 U. S. 639, opinion by Peckham, J., on page 668, it is said in discussing the *Brooks* case:

"The cases of *Sharp vs. Taylor*, *Tennant vs. Elliott*, *Farmer vs. Russell*, *Thomson vs. Thomson*, and *McBlair vs. Gibbs*, were cited as authority. We have already adverted to each of them (655-666), and we admit it is quite difficult to see how, with the exception of *Sharp vs. Taylor*, the principle upon which they were decided could be applied to the case then before the court."

But the case of *Sharp vs. Taylor* had been repudiated and practically overruled by the English

courts. (See opinion by Jessel, M. R., in *Sykes vs. Beadon*, 11 Ch. Div. 170-195.)

It follows, therefore, according to Justice Peckham, speaking for the court, that *Brooks vs. Martin* rests upon four cases that are not german and a fifth that has been repudiated by the very jurisdiction that decided it. So that whether considered upon reason or authority, it is not of much value.

But in any event the facts in the case of *Martin vs. Brooks* differ so materially from the facts in the case at bar that even though the *Martin* case be considered as rightfully decided upon its peculiar facts, it still has no value as a precedent in the determination of the case now in judgment. In that case there was a partnership entered into between Martin and Brooks and one of the partners engaged in the purchase of soldiers' claims long before script or land warrants were issued by the government, and contrary to the provisions of the Act of February 11, 1847, providing for the granting of land warrants to be issued to soldiers. The transactions of the partner were for the benefit of the partnership. He purchased many soldiers' claims. Subsequently the warrants and script which were issued to the soldiers, from whom the claims had been purchased contrary to the provisions of the statute, were by the soldiers duly assigned to the purchaser and thereafter those warrants were located upon lands. The lands were subsequently in large part sold, some

partly for cash and some partly on mortgages, and at the time of the commencement of the suit, the assets of the partnership consisted almost wholly of cash, securities or of lands. Judge Peckham, after stating the facts in substance as above in his opinion in *McMullan vs. Hoffman, supra*, said:

“The action was sustained upon the theory that the purpose of the partnership agreement had been fully closed and completed; that substantially all the profits arising therefrom had been invested in other securities or in lands, and that therefore it did not lie in the mouth of the partner who had by fraudulent means obtained possession and control of these funds to say to the other that the original contract was illegal. The original wrong done or intended to the soldiers had been wiped out by the acts of the soldier and his waiver of any claim by reason of the illegal contract. The transactions which were illegal, the court said, had become accomplished facts and could not be affected by any action which the court might take.

“The cases of *Sharp vs. Taylor*, *Tennant vs. Elliott*, *Farmer vs. Russell*, *Thompson vs. Thompson*, *McBlair vs. Gibbes* were cited as authority for the proposition. We have already adverted to each of them and we admit it is quite difficult to see how, with the exception of *Sharp vs. Taylor*, the principle upon which they were decided could be applied to the case then before the court.”

As before noted, the case of *Sharp vs. Taylor*

has been practically overruled. So we are unable to see of what special value *Martin vs. Brooks* is, because, first, upon the facts it is not german; and second, because the principle upon which it was decided is so severely criticized and questioned that it is practically eliminated as an authority.

McMullen vs. Hoffman, however, clearly defines what constitutes a collateral matter or contract and independent consideration. So there is no longer need for dispute or difference of opinion as to when a case falls within the exception. From the definition and illustrative cases there found, it seems beyond controversy that the instant case does not arise out of a collateral matter and does not rest upon an independent consideration, disassociated with the unlawful enterprise.

Funk vs. Gallivan, 49 Conn. 124 (11 Amer. R. 210).

King vs. Winants, 71 N. C. 469 (11 Amer. R. 11).

The case of *Armstrong vs. Toler*, *supra*, adopted by the Supreme Court in *McMullan vs. Hoffman*, *supra*, is the leading case, illustrative of what is meant by

“Arising out of a collateral matter, and resting upon an independent consideration.”

Let us see if it is possible to bring the facts of the case at bar within the scope or reason of *Armstrong*

vs. Toler. The appellant must prove that he was conducting a gambling game, viz: was engaged in a criminal enterprise; that he was making a profit out of it; that he continued his gambling operations for 45 days, when he was stopped by the injunction; that his net winnings amounted to a certain sum for that time; that thereafter his winnings were negligible; that he tried to continue his unlawful course by the use of a different gambling device, but that it failed to entice a sufficient number of victims to make it profitable; that appellee continued to play his game and made a profit. He then urges upon the court the conclusion from these facts that if he had been allowed to continue the commission of his crime, viz, carrying on his gambling game, he would have continued the same rate of earnings during the term of the injunction, and would have reaped a net profit from his crime to the amount of \$13,650. That appellee having made profits from the conduct of his game, it must be presumed that \$13,650.00 of those profits represents appellant's losses and were gains made by appellee out of appellant's business, and that, therefore, appellee must divide with the appellant the proceeds of the gambling game on the theory that he holds the profits or proceeds of an unlawful and criminal enterprise as a trustee *ex maleficio* for his account.

This is a fair and accurate statement of the facts and of the argument. It seems to us that the law speaks for itself out of these facts. *It is self*

*evident that appellant goes back to—indeed must go back to—and prove his unlawful and criminal activities as the very foundation of his claim. Next he must prove that he intended to continue his gambling operations. He must prove that his only loss is the loss of the winnings from his games. He must prove that we conducted a gambling game, and made profits by way of winnings. He must prove—and therein he utterly fails—that part of our winnings were made up of his losses. So, throughout his brief the unlawful and criminal enterprise is the thing, and without it he cannot move a step. It meets him at every turn. He must prove it and rely upon it as the foundation of his recovery. Without it he has no possible claim, because there could then be no loss. His loss grows out of a prohibition against a crime. The arguments in *Armstrong vs. Toler* and *McMullan vs. Hoffman* are conclusive of this case. Appellant endeavors to distinguish the principle in *McMullan vs. Hoffman* from the principle underlying this case, and pretends to find some such distinction noted by Justice Peckham in discussing the case of *Brooks vs. Martin* in its relation to *McMullan vs. Hoffman*. But as above shown the facts in *Brooks vs. Martin* are not parallel with those of the case at bar, and of the *Brooks* case Justice Peckham said:*

“We simply say that taking that case into due and fair consideration, we will not extend its authority as law beyond the facts therein

stated. We think it should not control the decision of the case now before us."

It is, therefore, apparent that the court did not attempt to make a distinction of principle between an unlawful enterprise relating to a municipality and an unlawful enterprise relating solely to private individuals. We submit there is no distinction in principle and any attempt to make such a distinction must be sophistical and illogical. We, therefore, confidently affirm that the case of *McMullan vs. Hoffman*, the entire theory thereof and the principle upon which it is decided, become determinative of the case at bar.

Appellant cites a number of cases in support of a proposition which he quotes from *Fuller vs. Berg*, 120 Fed. 274, as follows:

"Equity is not concerned with the general morals of complainant; but with the tort that is regarded as most affecting the particular right asserted in the suit. If the defendant can do no more than show the appellant has committed some legal or moral offense, which affects the defendant only as it does the public at large, the court must grant the equitable remedy and leave the punishment of the offense to other forums."

It is not necessary to discuss the soundness of the proposition as an abstract statement of the law, but we may say that we believe the case from which

it is quoted was not well decided, and that the dissenting opinion of Judge Grosseup states the law as it should have been interpreted and applied. But, however, that may be, neither the case itself, nor the quotation can afford any support to appellant's proposition under the facts in the instant case. In connection with said *Berger* case, we desire briefly to examine some of the other cases cited by counsel, upon the authority of which he seeks to avoid the force of the fact that the money he seeks to recover is anticipated profits of a criminal enterprise. The citations we examine are as follows:

Board of Trade vs. Kinsey, 130 Fed. 507.

The only question in that case was whether the Board of Trade, which sometimes permitted gambling on its Exchange, could go into a court of equity for the protection of its property right in market quotations based on transactions of its exchange, which had news value entirely independent of the exchange transactions. The court held that it could not deny relief on the ground of general immorality of the complainant not affecting the particular right asserted in the suit. That is, it sought to enjoin the defendants from purloining its market quotations and the court in substance held that the mere fact that the exchange permitted gambling in futures did not preclude it from enforcing a property right that was wholly independent and distinct from the gambling transactions which it permitted.

In the case of *Mills vs. Industrial Novelty Co.*, 230 Fed. 463, the question was whether a patentee was entitled to an injunction restraining an infringement of his invention where it appeared that it was being used by a licensee as one of the elements or factors in a gambling device, manufactured by the licensee and sold upon the market. The court held that the invention was innocent in itself, and because someone made an unlawful use of it, was no reason why the complainant was not entitled to relief. In this connection we might call the court's attention to the fact that playing cards and dice are the two most generally used gambling instruments within common knowledge. Yet they are capable of being used, and are used, for innocent amusements. Because of the unlawful use to which they are so largely put, could a manufacturer or vendor, who sought recovery for the purchase price of such articles, be defeated by allegation and proof that they were implements most commonly used for gambling purposes? It must be apparent that the case is not relevant to the matter here in suit. He cites the case of *Talbott vs. Independent Order of Owls*, 220 Fed. 660. This was a suit by one fraternal organization against another organization, to enjoin the use of its name and emblem. The court said:

“Nor does the evidence which is found in this record, upon which the defendants rely to defeat the plaintiffs and to bring this suit under the ban of the principle ‘he who comes into equity must come with clean hands,’ sustain

that defense. That principle does not repel all sinners from *the precincts* of courts of equity, nor does it *disqualify* any plaintiff from obtaining full relief there, who has not done iniquity in the transaction concerning which he complains. The wrong which may be invoked to defeat him must have an immediate and necessary relation to the equity for the enforcement of which he prays."

It is obvious that Harbaugh has done iniquity in the case at bar in the very transaction concerning which he complains. It is the anticipated profits of an intended crime that he seeks. The illegality which is shown in this case does have an immediate and necessary relation to the alleged equity for the enforcement of which he prays. The illegal and criminal act is the sole foundation for his claim.

Gilbert vs. Amer. Surety Co., 121 Fed. 499, is cited. We need but state the syllabus to understand how foreign the case is to any matter here in controversy:

"Where a contract for the sale of personal property was fully executed by the payment of the consideration and the delivery of the property, which was then turned over to the seller as agent and employe of the purchaser, and held by him for three years in such capacity, he cannot thereafter claim such property as his own against the purchaser on the ground that the sale was made in furtherance of a combination in restraint of trade, and was therefore void as

against public policy, since he is estopped to deny the title of his employer for whom he holds the property in trust."

In *Brown vs. Gold*, 80 Fed. 564, the facts were that:

"A. agreed to give credit to B., who was financially embarrassed, in consideration of a deed of trust made by B., which, for business reasons, was executed to C., a clerk of A. In a suit to enforce the trust, held, that the defense that complainant did not come into equity with clean hands had no application, there being nothing illegitimate in the transaction; and that, in any event, the maxim could not be invoked by B., who had received the benefit of the transaction."

City of Santa Cruz vs. Wykes, 202 Fed. 357, is a case involving only the question of *ultra vires* arising out of the purchase by a municipal corporation of water works and the issuance of bonds and a mortgage to the vendee in payment therefor. It was held in the case that the action of the Municipality was not *ultra vires* in the broad acceptation of the term, but only in so far as the contract at the time exceeded in amount the limit the law placed upon it, and that after having received the property and having reached a position where it had authority to become obligated for the full amount, the contract could not be repudiated. Now this brief review of these cases shows what an imagination one

must have in order to get any satisfactory aid out of them in solving the questions in the pending case.

II.

Our second point is that the evidence discloses such willful and flagrant violation of the injunctive order, both in letter and spirit, as to justify the court in refusing recovery upon the injunction bond. A willful violation of an injunctive order ought to be a good defense to an action upon an injunction bond, though there are cases to the contrary. Now, in the case at bar, the appellant admits that he took in—that is to say, received—from the operation of his gambling devices the sum of \$11,266.00 subsequent to the issuance of the injunction. See testimony of Harbaugh (T. R. 131).

It is true that he says most of the amount taken came from orders for gambling devices placed previous to the issuance of the injunction, but he did place machines after the injunction. The evidence shows that the machines were placed with customers at the price of \$150.00; that the purchase price was not to be accounted for or paid to Harbaugh except as the money was received by the customer from the play of those who sought to win the prizes. So that, throughout the period the injunction was in force, the appellant's gambling machines in large numbers were permitted by him to continue in operation in the hands of his customers, and to produce for him in the face of the injunctive order large

winnings which were paid to him from time to time during the period the injunction was in force by reason of the continued operation of these gambling devices in defiance of the injunction.

It will not do to say that he placed no new devices in operation during the time the injunction was in force, but merely continued to operate or permit the operation of those machines he had put out prior thereto. For it is evident that by continuing gambling with machines already placed and inducing play upon them by the prizes offered, he did continue the business that was prohibited by the injunction and not only in spirit, but in letter as well, violated the express terms of the injunctive order. Such being the case, he is in no position now to demand relief at the hands of this court. The question of damages is largely discretionary with the trial court. Judge Bean has held both as a matter of fact and of law that Harbaugh is not entitled to recover; this finding of fact supersedes that of the Master and is entitled to great weight.

III.

The evidence offered in support of Appellant's claim is wholly insufficient to authorize any award, because the same is so uncertain, speculative and problematical in character that it affords no reasonable basis for computation; and furthermore appellant has wholly failed to show by any evidence what-

ever that any of the business which appellant claims to have lost came to appellee. Harbaugh testified that with his new box, Ex. 7, he was able to handle all the business he could get (T. R. 90). *There is in the record no scintilla of evidence that the appellee did business with any existing or prospective customer of the appellant, nor that he received as a result of his operations a single dollar that would otherwise have gone to appellant.* We refer to the latter part of our statement of the case for a resume of the evidence on this point.

The Master sought to justify his award upon the following theory:

“It has long been the rule that for infringement of patent rights the plaintiff is entitled to recover the amount of gains and profits that the defendant has made by his unlawful use of plaintiff’s invention; *Tilgham vs. Proctor*, 125 U. S. 136-145; *Westinghouse Company vs. Wagner Company*, 225 U. S. 604-618.

“These and the cases therein cited proceed upon the theory that the infringer by reason of his wrong has received funds in the nature of gains and profits which in equity belong to the patentee. In the present case the situation is reversed. We have two people enjoying a monopoly of the business, each claiming under separate patents. The plaintiff by use of a restraining order unlawfully bars the defendant, his competitor, from the field, and thereby obtains profits, which otherwise would have been

the defendant's. A question arises as to whether or not the rule invoked in the cases above mentioned applies in a suit disclosing the fact last described.

“There does not seem to be any good reason why it should not, unless the fact that these funds arose from the use of a gambling device bars any recovery whatsoever.”

And he thereupon makes the following finding:

“That the fact that the device is a gambling device does not bar the defendant, Harbaugh, from recovering any profits which Dwyer obtained by reason of the restraining order and that as to those profits Dwyer is in the position of a trustee *ex maleficio*.”

The defendant's entire case is predicated upon this theory. We earnestly submit that the Master erred in so finding, for the simple reason that the theory adopted by him is based upon a rule that only applies when a patentee is allowed profits and damages from an infringer. This rule is authorized by the provisions of an express statute, to-wit:

“Upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover in addition to the profits to be accounted for by defendant, the damages the complainant has sustained thereby.”

(Section 4921, R. S.)

The case at bar does not come within the rule.

As already indicated, the liability referred to by the Master is a statutory right, whereas the liability in this case, if any there be, is found to exist and have its origin in the provisions of the bond, which Judge Wolverton required as a condition precedent to the granting of a preliminary injunction. In that particular, Judge Wolverton was vested with absolute discretion. He could have granted the injunction without a bond, in which event, upon the dissolution thereof, there would have been no possible recovery. *Russell vs. Farley*, 105 U. S. 433; *Scheck vs. Kelly*, 95 Fed. 941; *Myers vs. Black*, 120 U. S. 206.

Here, then, plaintiff's liability, if any, arose, not by reason of any statute, but by reason of the provisions of the bond required by Judge Wolverton, which was limited to the sum of \$10,000.00 "to secure the payment of any damages which might be awarded."

So it must be plain that it was not up to the plaintiff to account, as he would have been required to do had he been the infringer, but it was incumbent upon the defendant to prove his damages, and in doing so, he was confronted with his own assertion that the device is a gambling device; that he used it for no other purpose and that every cent of profit that would have been derived therefrom would have been the result of gambling in violation of the law. On the other hand, in the case of the patentee referred to in the Master's report, such patentee is

automatically vested with title to any profits made, in which case the infringer is held to be a trustee, and he must account therefor.

This distinction is so apparent that we felt entirely justified in looking to the defendant to make his proof of damages. This he could not do, and as a last resort the Master erroneously invoked the assistance of the above statutory rule and held that Dwyer should have proven that he did not profit instead of requiring Harbaugh to prove that he had been damaged and that we had received what he claimed to have lost. This seems to us a new rule of evidence. It is for a plaintiff to prove the basis of his recovery, not for a defendant to prove that his adversary is not entitled to recover. The whole theory of the law is affirmative and a party is nowhere required to prove a negative in the first instance.

In addition to the authorities already cited upon this question, we beg leave to submit the case of *Central Coal & Coke Co. vs. Hartment*, 111 Fed. 876 (8th Circuit), which we believe is squarely in point. The following are the head notes:

“Only actual damages established by the proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable. Speculative, remote or contingent damages cannot form the basis of a lawful judgment.

“The estimates, speculations, or conjectures or witnesses unfounded in the knowledge of actual facts from which the amount of the damages could have been inferred with reasonable certainty will no more sustain a judgment than the conjectures of a jury.

“The general rule is that the anticipated profits of a commercial business are too remote, speculative, and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to this rule that the loss of profits from the interruption of an established business may be recoverable where the plaintiff makes it reasonably certain by competent proof what the amount of his actual loss was.

“Proof of the expenses of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business.”

The following elements which enter into this case, we believe, plainly bring the same within the general rule, prohibiting the awarding of anticipatory profits because they are in their nature too remote, speculative and uncertain to warrant a judgment for their loss.

“(1) The business depended upon the exploitation of a gambling device, thereby involving the constant danger of police interference;

“(2) The gambling device was in the nature of a novelty which depended for its support upon the changing whims of the players; the extent of the support was measured by the duration of the novelty;

“(3) The defendant had no established business to point to; it had just been started, and the field of operation was limited;

“(4) The defendant had no provable facts. The records produced were not books of original entry, and were incorrect, incomplete and altered. The records of original entry such as cash books showing daily receipts of cash; the express book, showing the daily shipments of merchandise, together with check accounts, vouchers, etc., were destroyed or suppressed.”

We believe the evidence in the record conclusively supports the above statements. On page 107, T. R., we find a portion of the testimony of Louis Rubenstein, a witness on behalf of the defendants, as follows:

“In some cases when I came into the office I was told that a certain party would not have another one of those outfits because of police interference. I came in contact with that objection right from the start, when I began operating with the General Novelty in the Fall of 1918. In some places they continued right along.”

Page 108 discloses numerous conflicts with the police and at the bottom of the page he says:

“I could not tell at any time when the police would step in and interfere with the operation of these boxes. That is a chance that I was always taking with my business in every town I went to in the State of Washington and in every town in the State of Oregon. That was the chance I had to get any business—whether or not the merchants would care to risk the chance of police interference.”

The testimony continues to the same effect on page 109. Again on page 111 Rubenstein continues:

“It depended on how the town was moving, whether there was any work going on for those loggers, or other people who attend these places—or whether the police let the matter be without interference. The merchants with whom I ordinarily deposited these boxes were cigar stores, candy stores, soft drink houses. A great many of them soft drink houses and pool rooms, where there were boys hanging around. It depends upon the boys that hang around these places that spend the money. These boys didn’t expect to buy a collar button for a nickel; they expected to get something big—a camera, for instance. A fellow would keep on pulling these tickets until he struck something big before he quit.”

Again at the bottom of pages 130 and 131 is the testimony of Paul C. Harbaugh, which we have heretofore quoted, and which discloses the impossibility of arriving at any definite opinion as to what amount of income might continue to be received from the operation of these devices.

On page 157 Harbaugh again testified when recalled as a witness on his own behalf:

“Police interference occurred from the very beginning,—was spasmodic. Notwithstanding such interference I did the business which I have testified to prior to the time of my being enjoined.”

Further on page 158 he testified that his papers and records were in such bad order and so many of them lost, that the fair conclusion is that he was unable to arrive at any reasonable statement of his business.

We quote on page 180 from the testimony of J. F. Dwyer:

“It also depends upon the sporting instincts of the people who play this device. It also depends upon the business condition of the vicinity and the business getting ability of the dealer where this device is placed. It also depends upon the general business conditions, whether the town is so-called open or closed—whether the fellows in the town have to patronize pool halls and card rooms or not, and where the device is placed in the town. In other words, whether they have the money to take a chance.”

He further states at the bottom of page 181:

“I was still in business just as usual as theretofore and I was subject to the same police

- interference. When I had interference in one place, by the police, I immediately went into another.”

So it appears that our conclusions as to the speculative and uncertain character of the evidence upon which the amount of anticipatory profits is based are wholly justified and supported by the record.

IV.

If the appellant is entitled to recover at all by reason of the injunction issued in this case, such recovery cannot exceed the amount of the injunction bond, or the amount of the deposit made in lieu of a bond, as a condition for the issuance of the injunction. Such is the uniform rule, and for this reason: The grant or refusal of an injunction is wholly discretionary with the court, and in the absence of express statute it is likewise discretionary whether when granting an injunction the court shall require a bond or not. If no bond is required, then no damages are recoverable upon the dissolution of the injunction for the grant of the writ or injunctive order is a judicial act, and any damage flowing therefrom is *damnum absque in juria*. If, in the exercise of discretion, the court requires a bond or security, it follows, of course, that the recovery is limited to such bond or security, for the amount thereof depends upon the discretion of the court exercised judicially and thereby the court itself

measures the utmost limit of the legal injury to the party against whom the writ may run. The United States courts have had occasion to pass upon this particular question on several occasions, and the court's attention is directed to the following case:

Scheck vs. Kelly, 95 Fed. 941.

Syllabus:

“Where an injunction has been granted without bond, and subsequently the injunction is dissolved and the bill dismissed, no action will lie at the instance of the defendant against the plaintiff in the injunction suit for damages sustained by reason of the issuance of said injunction.”

In that case the court quotes with approval from the opinion of the Supreme Court of Missouri in the case of the *City of St. Louis vs. St. Louis Gas Light Company*, 82 Mo. 354, where it is said:

“It seems that without some security given before the granting of an injunctive order or without some order of the court, or a judge requiring some act on the part of the plaintiff which is equivalent to the giving of security, such as a deposit of money in court, the defendant has no remedy for damages which he may sustain from the issuing of the injunction unless the conduct of the plaintiff has been such as to give ground for an action for malicious prosecution.”

The court also cites:

Russell vs. Farley, 105 U. S. 433;

Lawton vs. Green, 64 N. Y. 326;

Hayden vs. Keith, 20 N. W. 195 (Minn.).

Again in the case of *Cimiotti Unhairing Co. et al. vs. American Fur Refining Co. et al.*, 158 Fed. 171, it is held:

“There is no statute or rule restricting the discretion of a Federal Court in fixing the amount of an injunction bond or in imposing terms as a condition of granting an injunction, and in the absence of such statute or rule where the court in its discretion has fixed the amount of such bond, which has been given, the liability of the complainant is limited to the amount thereof, which covers everything, including both damages and costs.”

In that case the court required a bond of \$15,000 as a condition to the issuance of the injunction. Upon the dissolution of the injunction the matter was referred to a Master to assess the damages and he reported \$18,406.70. Upon exceptions to the report Lanning, District Judge, said:

“As the court has discretionary power to grant an injunction without bond, it has discretionary power to fix the amount of the bond in case one is required. When a bond is given its penal sum is notice to the applicant for injunction of the maximum risk he must assume if the injunction be issued. He cannot be required to assume a burden greater than that which the

Chancellor, in the exercise of his discretion, has imposed.”

The Court thereupon fixed the amount of recovery at the penal sum of the bond, viz: \$15,000, notwithstanding the Master's assessment of \$18,406.70. That case went on appeal to the Court of Appeals for the Third Circuit, 168 Fed. 529, and the Court after a careful and exhaustive examination of the question held:

“Where a Federal court as a condition to the granting of a preliminary injunction required complainant to give bond in a stated sum to indemnify the defendant against loss or injury due to the improvident or erroneous granting of such injunction, the liability of the complainant as well as the surety is limited to the amount of such bond and neither further damages, interest nor costs can be awarded in addition thereto.”

The defendant contended it was entitled to recover the entire amount of its loss and damage, but the court said:

“We cannot agree that the requirements of a bond for \$15,000 was merely a provision for collateral security for the fulfillment of an obligation—implied if not express—to indemnify generally and without limitation.”

It was further said by the court that they had been unable to find any case where a recovery was allowed in excess of the amount of the bond.

The Court then quotes from:

Myers vs. Block, and

Myers vs. Isaacs, 120 U. S. 206.

“This cannot be done in the United States courts. Without a bond no damages can be recovered at all. Without a bond for the payment of damages, or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs unless he can make out a case of malicious prosecution. *It is only by reason of the bond and upon the bond that he can recover anything.*”

The Court proceeds then with its own opinion, as follows:

“In our opinion, however, the Court below was clearly right in not adding interest or costs to the sum named in the injunction bond. It limited the total liability for interest, as well as principal, to \$15,000, and even a court of equity, whose discretion as to costs is generally controlling, would, we think, exceed its authority if as to proceedings taken under such a provision, it ordered payment of costs to either party. As was said by Mr. Justice Bradley, *supra* (*Myers vs. Block*), it is only by reason of the bond that a party against whom an injunction wrongfully issues can recover anything, and therefore, it is difficult to see how the claim of the defendant for interest and costs not nominated in the bond could possibly have been allowed.”

The decree of the Circuit Court was therefore affirmed.

Doyle vs. Sandpoint, 18 Idaho, 654 (112 Pac. 104) ; (note to 32 L. R. A. N. S. 34).

We feel entire confidence in the accuracy and soundness of each of our several propositions, viz :

First: That anticipated profits arising out of the commission of a crime are not recoverable in a court of equity nor in any other judicial tribunal.

Second. That a flagrant violation both of the spirit and letter of an injunctive order is sufficient ground for the court to exercise its discretion against the allowance of damages.

Third. That the evidence offered by appellant in support of his claim of damages is all of it of such a speculative, problematical, remote and uncertain nature that it affords no basis for computation of lost profits, and there being no evidence of any gains made by appellee, there is in fact no competent evidence upon which any judgment for damages can rest.

Fourth. That in all events appellant could not recover any amount in excess of the sum stipulated in the bond.

It seems certain, therefore, that the decree

herein must be affirmed and we submit the cause to the court with confidence.

JOHN W. ROBERTS and
E. L. SKEEL,

Solicitors for Appellee.

FRANK A. STEELE, *of Counsel.*